Supreme Court, U.S.
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No. 91-5843

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DENNIS SOCHOR,

Petitioner,

v.

FLORIDA,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Did the Florida Supreme Court's review of petitioner's death sentence violate the Eighth and Fourteenth Amendments where that court upheld the sentence even though the trial court had instructed the jury on, and had applied, an improper aggravating circumstance, where the Florida Supreme Court did not reweigh the evidence or conduct a harmless error analysis as to the effect of improper use of the circumstance on the jury's penalty verdict?

2. Did the application of Florida's "especially heinous, atrocious, or cruel" aggravating circumstance at bar violate the Eighth and Fourteenth Amendments?

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OPINION BELOW

The decision of the Supreme Court of Florida, JA 367, is reported at 580 So.2d 595.

JURISDICTION

The Florida Supreme Court entered its opinion on May 2, 1991, and denied a timely motion for rehearing on June 18, 1991. The petition for a writ of certiorari was filed on September 16, 1991, and was granted on November 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Mr. Sochor having asserted in the state court below and asserting in this Court that

the State of Florida has deprived him of rights secured by the Constitution of the United States.

PROVISIONS OF LAW INVOLVED

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Section One of the Fourteenth Amendment provides in pertinent part:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Section 921.141, Florida Statutes, which governs capital sentencing proceedings in Florida, is set out in Appendix A to this brief.

STATEMENT OF THE CASE

A jury in Broward County, Florida found Dennis Sochor guilty of first degree murder and kidnapping in the disappearance of Patricia Gifford. A day after finding Mr. Sochor guilty, and after hearing further evidence, argument, and instructions, the jury recommended by a vote of ten to two that he be sentenced to death for the murder. Finding four aggravating circumstances,[1] and "no mitigating circumstances to outweigh the aggravating circumstances," JA 353, the trial judge followed that recommendation, and also sentenced Mr. Sochor to life imprisonment for the kidnapping. On appeal, the Florida Supreme Court affirmed the convictions and sentences.

[1] That the murder was cold, calculated and premeditated; that it was especially heinous, atrocious or cruel; that Mr. Sochor had previously been convicted of a violent felony; and that the murder occurred during the course of a violent felony. JA 348-354.

A. Prior to trial, Mr. Sochor argued in a written motion that the "especially heinous, atrocious, or cruel" aggravating circumstance [2] was unconstitutional on three grounds: it could be applied to almost any capital felony; its application in practice indicated that reasonable and consistent application was impossible; and the circumstance was vague and overbroad and provided no basis for distinguishing its application to any particular factual situation. JA. 10. The court denied the motion without discussion. JA 19-26.

B. This cause arose from the disappearance and presumed death of Patricia Gifford on the night of December 31, 1981. The evidence as to what happened to her consisted almost entirely of accounts given by Dennis Sochor and his brother Gary, who was the state's main witness at trial. Ms. Gifford's body was never found.

The evidence at trial unequivocally showed that, on the evening of December 31, 1981, Patricia Gifford and a friend went to a bar in Broward County, Florida to celebrate New Year's Eve. At the bar, she conversed with Dennis Sochor, who had gone to the bar with Gary, who was vacationing from Michigan. Ms. Gifford's companion fell ill, and the Sochor brothers helped Ms. Gifford take her to her car. Ms. Gifford briefly returned to the bar and then went out to the parking lot to meet Dennis Sochor. She was never seen again.

The next day, her friend notified the police that she was missing, and an investigation turned up a photograph that someone had taken of her with Mr. Sochor at the bar. Publication of the photograph soon led to Gary Sochor, the only eyewitness to the offense. He returned to Florida from Michigan and tried to help find the body. At trial he gave this account:

When she came back out of the bar, Ms. Gifford agreed to join the men in getting something to eat, and the three

[2] § 921.141(5)(h), Fla.Stat.

set off in a truck driven by Dennis. Before entering the truck, Ms. Gifford and Dennis were kissing in the parking lot. JA 34-36. Gary's testimony on direct examination continued:

Q Did there come a time when the vehicle stopped?

A I remember the vehicle coming to a stop, and Denny got out of the truck and—

Q Now, do you remember a time when Patty said something to you?

A Patty was hollaring [sic] for help, asking what was going on.

Q Who was she yelling to help her?

A Myself. I got out of the passenger side, ran around the vehicle, and Denny had her on the ground, had her hands pinned down. I hollared [sic] at him, and—

Q What was she doing at that time, Patty?

A Just laying [sic] there, and I couldn't understand what was happening, and I just hollared [sic] at Denny to leave her alone. I went and picked up a stone, looking for a rock or stone or something, and I remember throwing—not to hit him. I threw the stone just above his head to scare him, and he turned and looked at me and told me to get back in the truck, which I did.

Q And why did you get back in the truck?

A Well, in our past, Denny would—we would get in brotherly arguments and fights, and sometimes Denny would get real furious and—

Q Let me ask you this: How did he look when you saw him out there? Describe him, if you would, to the ladies and gentlemen of the jury.

A I wouldn't know what came over him at times, but a couple of times in our past and at that particular time—

Q Do you need a drink of water, Gary?

A Some air.

MR. HANCOCK: Can we get a drink of water for him?

Q (By Mr. Hancock) Just relax.

A The pupil would roll back, and all I'd see is white in his eyes, and he'd be very—real furious, and in a voice that wasn't his. It would be deep, and would scare you.

Q And can you describe this look?

A He looked to be possessed.

Q What do you mean by "he looked to be possessed?

A Well, I don't know. It wasn't him. He was possessed by something, you know. I always looked at it as the devil.

Q Now, you indicated you had seen this look before; correct?

A Yes.

Q Now, after that, you indicated you got back in the truck; correct?

A Yes.

Q And after getting back in the truck, can you tell the ladies and gentlemen of the jury what you did?

A I put my face in my mands, in my lap, and just sat there.

Q And how long was it before Dennis came back into the truck?

A It seemed to be around five minutes, a couple of minutes, not very long.

Q Did you ever see Patty again?

A No.

Q And what happened after he got back in the truck?

A As we started down the road—and it's not hard to remember, but it's just I can remember him starting to talk to me, and I started screaming because I didn't want to hear anything he had to say. I didn't look at him. I didn't sit up. I was just screaming.

Q And why didn't you make any effort to help Patty?

A I was scared of him. We got in some fights in our past, and I usually ended up on the short end of the deal.

Q And after you got back in, did he say anything to you about telling anyone?

A All I remember is the screaming, just screaming, not saying anything, just screaming, and all I remember him saying was that if I didn't shut up, I'd never see my family again.

Q When he gave that threat to you, what did you say or do?

A The next thing I remember, I stopped screaming, and I sat straight up in the truck, and I seen the stoplight, and it was like I didn't remember a thing. I mean I asked him to take me to the beach.

Q And did there come a time when he went back to his place?

A All I remember now is arguing with him about taking me to the beach.

Q Did you get back to the apartment, to where he was living?

A Yeah, he wouldn't take me to the beach, and we got back to the apartment, and I remember getting out and still arguing about I wanted to go down to the beach, and I can remember somebody at the other apartment hollaring [sic] at us to quiet down.

JA 37-40.

Meanwhile, after seeing his picture in the newspaper, Dennis Sochor had fled the area, but was eventually arrested in Georgia in 1986 for a traffic offense. Capt. Mark Schlein and Sgt. Paul Luria of the Broward County Sheriff's Office conducted a taped interview of him in Georgia. The discussion concerned uncontrollable urges that would come over him, after which he could not recall what he had done. He said that on the morning of January 1, 1982, he again had the feeling that he had done something terrible the night before, that he had raped another woman. JA 120. There were scratches on his face,[3] and his brother told him that a woman's shoes and purse were in the truck. JA 120-21. He had been quite drunk the night before, and remembered driving his brother home. JA 116-18. He remembered that a woman had refused to have sex. JA 120. When he saw his picture in the newspaper, he did not recall what had happened, but he thought he had committed another rape, and left the area. JA 122-23. Although he did not know what caused these uncontrollable feelings, he said they are more prevalent when he had been drinking. JA 124-25.

The officers took Mr. Sochor back to Broward County, and then to the bar's parking lot. According to Capt. Schlein, Mr. Sochor became "very emotional," and said that he had choked and killed the woman. JA 131-32. The officers took another taped statement which again contained discussion of the uncontrollable urges that take over Mr. Sochor and his remorse, but which also furnished these details:

> Q Just listen to me. You were sitting in the truck, and she was sitting in the truck. Could you tell me what you said to her at that point?
>
> A I remember we kissed a few times, and I just started getting stimulated.

---

[3] Other witnesses confirmed seeing scratches on his face.

Q What did you feel like?

A Like having sex.

Q Have you felt that way before?

A Yes.

Q And when you felt that way before with a girl, what happened?

A Well, not everytime [sic], but some uncontrollable feeling took over.

Q What happened next?

A There was an argument.

Q About what?

A Having sex.

Q Did you ask her—did you want sex?

A Yes.

Q Well, what was she saying?

A No.

Q Describe what happened next.

A And I grabbed her.

Q Tell me what happened.

A And then she hit me and—

Q Where did you grab her?

A I'm not sure, the hair or something. I don't know.

Q What was she doing?

A She started hitting me and—

Q What else was she doing?

A And started screaming.

Q Go on.

A I panicked, and I think she scratched me and—

Q What happened after she was hitting you and scratching you, go on. What happened next? What did you do?

A I think I got angry and began choking her.

Q While you were choking her, what was she doing?

A Fighting.

Q Go on.

A And then she didn't move.

Q What happened next?

A Then I didn't see her move, and I got scared.

Q What were you scared of?

A Of what had just happened.

Q What did you think had just happened? What did you just do?

A I probably just murdered her.

Q When you looked at her, was she breathing?

A No.

Q What were you thinking?

A I just killed her.

JA 138-40. He then drove off, ultimately leaving the body covered by a blanket near some bushes. JA 141. He did not have sex with the body. *Id.*

Mr. Sochor unsuccessfully tried to help the police find the body. JA 146. He then made another statement, which was largely concerned with questioning about where he had left the body (he was unsure), but also contained an account similar to the foregoing, in which he said that Gary was not present when he was with the woman, JA 162-63, and (this is less clear) that he killed her inside the truck. JA 163.

Several mental health experts testified about Mr. Sochor's mental state at the time of the offense, basing

their testimony on examinations occurring after his 1986 arrest. The presentation of their testimony was somewhat confused. Defense counsel had not talked to the two defense experts (Drs. Zager and Ceros-Livingston) before calling them to the stand (in fact, he was unaware of the field of expertise of one of them, R 693-94). Dr. Zager testified that Mr. Sochor could be extremely dangerous and was legally sane at the time of the offense. R 657-58. Dr. Ceros-Livingston also testified that Mr. Sochor was legally sane at the time of the offense and that he showed a "fake-bad" profile when tested. R 714. On cross-examination, the prosecutor showed that these witnesses knew almost nothing about the facts of the case except for half-remembered newspaper accounts.[4] They apparently knew nothing of Gary's version of the crime. Dr. Castillo, called by the state in rebuttal, testified that Mr. Sochor had "a type of selective amnesia" about the facts of the incident. R 798. Again, the doctor's information about the facts of the case consisted of newspaper accounts. R 797. These witnesses agreed that Mr. Sochor did not meet the criteria for involuntary hospitalization of mentally incompetent persons under Florida's "Baker Act" (sections 394.451 through 394.4789, Florida Statutes), but was an alcoholic and had abused drugs, and had mental problems.

Paul Jones, who had lived with Mr. Sochor in Georgia, testified that Mr. Sochor had told him that he had choked someone and had put the body in a drainage pipe, and that it would not bother him to do it again. R 564. Michael Hickey, a jail inmate, said that Mr. Sochor told him that he had killed a "fucking, slut, bitch" while his brother was hitting him. R 579-80.

C. At sentencing, the state presented testimony regarding previous brutal sexual assaults committed by Mr.

[4] R 662-687 (testimony of Dr. Zager); R 721 (testimony of Dr. Ceros-Livingston)

Sochor in Florida and Michigan, JA 217-26, 230-35, and testimony from his former wife regarding violent sexual acts that he had committed against her. JA 197-200. It was her opinion that Mr. Sochor's behavior was erie and crazy, and could be characterized as psychotic. JA 207. She also testified that Mr. Sochor had stolen purses from prostitutes while stationed in Italy as a paratrooper. JA 208-209.

Ronald Wright, a pathologist, testified that strangulation is a slow death "relatively speaking." JA 211. He also said that it can be a very quick death without pain, JA 215-16, and that the person can die within 13 seconds if short of breath at the time of the strangulation. JA 214-15.

Mr. Sochor presented evidence from family members detailing extensive and brutal physical abuse of Dennis by his father during his childhood, showing that Dennis had been placed in a mental hospital in the past, that he could go beserk under the influence of alcohol, and that his mother abused him as a child. JA 242-48, 256-64, 268-78, 290-94.

The written reports of the mental health experts who testified at trial were placed into evidence, JA 194, but it is not clear whether the jury reviewed them. They did not purport to address statutory or nonstatutory mitigating circumstances.

D. At sentencing, the prosecutor argued to the jury that the murder of Ms. Gifford was cold, calculated, and premeditated,[5] JA 306, and the trial court instructed the jury on that aggravating circumstance. JA 326-27. In its sentencing order, the trial court found that the facts supported the circumstance. JA 350-51. On appeal, the Florida Supreme Court struck the circumstance:

[5] Under section 921.141(5)(i), Florida Statutes, the jury and judge in a capital sentencing proceeding may consider in aggravation that the murder "was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification."

> We disagree, however, that the murder was committed in a cold, calculated, and premeditated manner. Although there was sufficient evidence to suport a premeditated murder conviction, this aggravator requires a "heightened" level of premeditation. *Hamblen v. State*, 527 So.2d 800 (Fla.1988). The evidence introduced at trial failed to demonstrate this requisite heightened level of premeditation. Rather, the killing most likely resulted from the victim's refusal to have consensual sex with Sochor and her resistance when he attempted to force himself upon her.

JA 379-80; 580 So.2d at 603. Nevertheless, the court upheld the death sentence, writing at page 604 (JA 381):

> The trial court carefully weighed the the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

E. The prosecutor also argued to the jury at sentencing that the murder was "especially heinous, atrocious, or cruel,"[6] JA 305-306, 311-12, and the court instructed the jury as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.
>
> . . . .
>
> . . . and number three, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. . . .

JA 326. The trial court used the circumstance in sentencing Mr. Sochor:

[6] § 921.141(5)(h), Fla.Stat.

> The Court finds, according to Florida Statutes 921.141 (5)(h), that the capital felony was especially heinous, atrocious or cruel. The evidence indicated that the victim was forcibly removed from the truck while she pleaded for help and even begged for her life. Even though Patricia Gifford's body was never recovered and no one knows how badly she was beaten, the Defendant admitted in his statements that as he choked her she resisted and fought him. There were several fingernail marks on his face which substantiates that violent struggle ensued as confirmed by the Defendant's statements to the police officer. Dr. Wright testified that asphyxiation is a slow and painful death. Fear and emotional trauma preceding the victim's death may be considered as contributing to the heinous nature of the capital felony. It is clear there was fear and definitely emotional trauma before her death.

JA 350. Affirming, the supreme court wrote:

> The evidence also supports finding that the murder was especially heinous, atrocious, or cruel. Fear and emotional strain can contribute to the heinousness of the murder. *Adams*, 412 So.2d at 857. Gary testified that the victim screamed for help after she was dragged from the truck and scratches on Sochor's face indicate that a struggle took place. The evidence supports the conclusion of horror and contemplation of serious injury or death by the victim. Moreover, Sochor confessed that he choked the victim to death. It can be inferred that "strangulation, when perpetrated upon a conscious victim, involves foreknowledge of death, extreme anxiety and fear, and that this method of killing is one to which the factor of heinousness is applicable." *Tompkins v. State*, 502 So.2d 415, 421 (Fla.1986) (citations omitted), *cert. denied*, 483 U.S. 1033, 107 S.Ct. 3277, 91 L.Ed.2d 781 (1987). *Accord Johnson v. State*, 465 So.2d 499 (Fla.), *cert. denied*, 474 U.S. 865, 106 S.Ct. 186, 88 L.Ed.2d 155 (1985); *Doyle v. State*, 460 So.2d 353

(Fla.1984). The trial court properly found this aggravating factor.

JA 379.

F. In his sentencing order, the trial judge wrote regarding the statutory mitigating circumstance of extreme mental or emotional disturbance: [7]

> This mitigating circumstance does not apply. The doctors who testified all found the Defendant competent and that he did not meet the criteria for involuntary hospitalization pursuant to the Baker Act. However, he was diagnosed as extremely dangerous and violent. Even though the Defendant claimed to the doctors he could not remember what happened, the Court finds as Dr. Castillo testified that the Defendant suffered from "selective amnesia" and attempted to mislead the doctors as to his recollection of the murderous incident.

JA 351. Regarding the statutory mitigating circumstance of substantial impairment of the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,[8] he wrote:

> This mitigating circumstance does not apply. All the credible evidence indicates that the Defendant was able to appreciate the criminality of his conduct and was able to conform his conduct to the requirements of law if he so desired. He told a witness who testified during the trial, that he had choked someone in Fort Lauderdale, Florida and it was so easy that he could do it again. Even though the Defendant maintained he was intoxicated during the crime, the testimony from all the witnesses showed, though he may have had some alcoholic drinks, he was still in control of his actions and behavior and knew what was happening. His ex wife testified that he acted violently even when he was not under the influence of alcohol.

[7] § 921.141(6)(b), Fla.Stat.

[8] § 921.141(6)(f), Fla.Stat.

JA 352-53. Regarding nonstatutory mitigation, he wrote:

> 8. Any other aspect of the Defendant's character or record and any other circumstance of the offense. There were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory "mitigating" circumstances.

JA 353. He then concluded on the same page:

> In Summary, it is the conclusion of the Court, after conscientiously weighing the aggravating and mitigating circumstances, that there are sufficient aggravating and mitigating circumstances to justify and warrant the imposition of the death penalty and that there are no mitigating circumstances to outweigh the aggravating circumstances.

In affirming, the supreme court wrote:

> Sochor argues that the court should have found as mitigating factors that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. In proof he relies on evidence of his alcohol use the night in question and on doctors' testimony that he was a dangerous and violent person when drinking. Sochor is an admitted rapist. As testified to by his ex-wife and the victim of a prior rape, when they declined to accede to Sochor's requests for sex he became violent. He himself explains that, when sexually aroused, an indescribable feeling comes over him in the form of an irresistible impulse particularly when drinking. It is difficult to discern whether such conduct is mitigating, but the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. Reversal is not warranted simply because the appellant arrives at a different conclusion. *Stano v. State*, 560 So.2d 890 (Fla.1984), *cert. denied*, 471 U.S. 1111, 105 S.Ct. 2347, 85 L.Ed.2d 863 (1985).

Although several doctors testified as to Sochor's mental instability, one testified that Sochor had not been truthful during testing and another testified that Sochor had "selective amnesia." While the sentencing order mentioned that Sochor had been found competent to stand trial and did not require Baker Act hospitalization, it is clear from the record that this is not the standard the court used in sentencing Sochor. We see no reason to disturb the court's rejection of these mitigating factors.

Sochor also argues that the trial court failed to consider and improperly excluded nonstatutory mitigating evidence. The court in its sentencing order stated "[t]here were several members of the Defendant's family who tearfully and grievously testified. However, after considering their testimony, this Court finds no nonstatutory 'mitigating' circumstances." This testimony related Sochor's physical abuse by his father, his financial support of the family when his father was unable to work, his alcohol problems, and his violent temper and mental instability. The trial judge considered the evidence of family and personal history, but determined it was so insignificant that it had not been established as a mitigating circumstance. Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion. *King v. Dugger*, 555 So.2d 355 (Fla.1990); *Scull v. State*, 533 So.2d 1137 (Fla. 1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989). We find no abuse of discretion in finding that the evidence did not rise to being a mitigating circumstance.

JA 380-81; 580 So.2d at 603-604.

SUMMARY OF ARGUMENT

1. The Florida Supreme Court violated the teachings of *Parker v. Dugger*, 111 S.Ct. 731 (1991) and *Clemons v. Mississippi*, 110 U.S. 1441 (1990) in affirming Mr. Sochor's death sentence. *Parker* and *Clemons* teach that,

when a state appellate court has struck an aggravating circumstance relied on in sentencing a person to death, it may not affirm the sentence unless it either conducts an independent reweighing of the remaining evidence or conducts harmless error analysis. *Parker*, 111 S.Ct. at 738. While *Parker* involved a life recommendation from the jury, and the present case involves a death recommendation, *Parker* still controls because the jury was urged to consider, and was instructed on, the improper circumstance, and the trial court relied on the circumstance in sentencing Mr. Sochor.

The Florida Supreme Court has repeatedly asserted that it does not reweigh evidence, and it did not do so here. Instead, it deferred to the trial court's findings in its sentencing order. It also did not conduct a proper harmless error analysis, because it did not carefully examine the evidence presented to the jury to determine beyond a reasonable doubt that, without the circumstance, Mr. Sochor would still have been sentenced to death.

Since the court neither reweighed nor conducted a proper harmless error analysis, its decision should be reversed.

2. The state courts' application of the "especially heinous, atrocious, or cruel" aggravating circumstance rendered Mr. Sochor's death sentence unconstitutional. The instruction used at bar violated the Eighth Amendment under the teachings of *Maynard v. Cartwright*, 486 U.S. 352 (1988), so that remand is required under *Shell v. Mississippi*, 111 S.Ct. 313 (1990) if Florida is treated as a jury sentencing state. If Florida is treated as a judge sentencing state, remand is required under *Walton v. Arizona*, 110 S.Ct. 3047 (1990) because Florida's use of the sentencing circumstance has long deviated from the narrow construction approved in *Proffitt v. Florida*, 428 U.S. 242 (1976) (plurality opinion), the trial court did not employ the *Proffitt* construction, and the supreme court did not make its own determination of the circum-

stance and did not conduct a harmless error analysis. Further, the application of the circumstance over the years has been so standardless and erratic that the circumstance is itself unconstitutional under *Proffitt* and *Maynard*.

ARGUMENT

I. INADEQUACY OF APPELLATE REVIEW

A. In *Parker v. State*, 458 So.2d 750, *cert. denied*, 470 U.S. 1088 (1985), the Florida Supreme Court struck two of the six aggravating circumstances on which the trial court had relied in imposing a death sentence, but upheld the sentence where the trial court had written in its sentencing order that it had found no mitigating circumstances that outweighed the aggravating circumstances. The case came before the Court on certiorari review of the Eleventh Circuit's reversal of habeas corpus relief. 111 S.Ct. 731. Noting that the state supreme court did not independently reweigh the evidence, but may have concluded a harmless error analysis, the Court concluded that Mr. Parker's death sentence was illegal because the state supreme court had not taken into account the mitigating evidence and factors considered and weighed by the trial court.

Because Florida is a "weighing state," in which the sentence is determined on the basis of a particularized balance of aggravating and mitigating factors,[9] the striking of two of the aggravating circumstances by the Florida Supreme Court altered the balance involved in making an " '*individualized* determination on the basis of the character of the individual and the circumstances of the crime.' " 111 S.Ct. at 739 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983); emphasis in *Zant*). By affirming the sentence without a new, individualized determination taking mitigating and aggravating factors into account, the supreme court deprived Mr. Parker of a forum in which his mitigating evidence was considered and

[9] § 921.141(2), Fla.Stat.

given effect as a counterweight to the remaining aggravating circumstances, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978); *Penry v. Lynaugh*, 492 U.S. 302 (1989); and *Clemons*, 110 S.Ct. at 1450 ("An automatic rule of affirmance in a weighing State would be invalid . . . , for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances."). Thus the affirmance of the death sentence "deprived Parker of the individualized treatment to which he was entitled under the Constitution." 111 S.Ct. at 740.

Parker followed *Clemons*, which approved two distinct procedures by which a state appellate court can affirm a death sentence even after striking one or more aggravating circumstances used in the trial court: the state court can independently reweigh the mix of mitigating factors and aggravating circumstances, or it can find the error was harmless. *Parker*, 111 S.Ct. at 738; *Clemons*, 110 S.Ct. at 1451.

B. The first question for decision here is whether *Parker*'s holdings that meaningful appellate review plays "a crucial role . . . in the ensuring that the death penalty is not imposed arbitrarily or irrationally," 111 S.Ct. at 739, and that "meaningful appellate review requires that the appellate court consider the defendant's actual record," *id.*, are inapplicable here because Mr. Sochor's jury, unlike Mr. Parker's, recommended a death sentence. Such a distinction is without a constitutional difference. Although *Parker* recognized the prominent place of the *Tedder*[10] rule in Florida's jurisprudence, and although *Tedder* is of great importance for many issues, including the harmless error issue discussed below, the Court's only reference to *Tedder* in connection with the present issue

[10] *Tedder v. State*, 322 So.2d 908 (Fla.1975) (judge may override life verdict only where virtually no reasonable person could differ with death sentence).

was as one of the bases for concluding factually that the *Parker* judge must have found some nonstatutory mitigating evidence. 111 S.Ct. at 737. None of the constitutional reasoning that required appellate reweighing or harmless error analysis when aggravating circumstances are stricken on appeal turned on the fact that the Parker jury had recommended a life sentence.[11] And the fact that Mr. Sochor's jury recommended death does not abate the need for meaningful appellate review.[12] The legally insupportable "premeditation" circumstance was submitted to Mr. Sochor's jury as well as found by his trial judge; whether it affected the jury's verdict is unknowable because Florida juries make no specific factual findings of aggravation or mitigation, and the verdict reflects only a weighing of the relative "sufficiencies" of aggravating and mitigating circumstances. *See Parker*, 111 S.Ct. at 735. For the same reason, we do not know whether the jury found any mitigation to weigh against the aggravation at bar. Thus in light of the Florida Supreme Court's striking of the "premeditation" circumstance, the jury's verdict provides no better assurance than the trial judge's findings that the mitigating evidence could not have outweighed the aggravating circumstances without the struck circumstance.[13]

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[11] Because Mr. Parker's jury had recommended a life sentence, this Court did not have to consider the effect of the error on the verdict in his case. But here, the death sentence rested on the jury's death recommendation. The appellate review in a death recommendation case must go to the effect of error on the jury verdict in order to address its effect on the resulting sentencing order.

[12] The Court recognized the need for full appellate review in Florida in *Proffitt*, a case involving a jury death recommendation.

[13] In striking the "premeditation" circumstance without substantial discussion, the supreme court did not address Mr. Sochor's constitutional arguments regarding the circumstance. He had argued at pages 96-97 and 111-12 of his initial brief that both the circumstance and its jury instruction violated the teachings of *Maynard*. Had the court upheld the application of the circumstance at bar, its use would have been unconstitutional: the Florida Supreme Court has written that the circumstance is unconstitutional without a limiting construction. *Porter v. State*, 564 So.2d 1060, 1063-64 (Fla. 1990) (discussing limiting construction put on circumstance by *Rogers v. State*, 511 So.2d 526 (Fla.1984)). The jury instruction used at bar makes no mention of the *Rogers/Porter* limitation, which no doubt led to the misapplication of the circumstance at bar. As to some problems with the circumstance, *see* Kennedy, *Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases*, 17 STETSON L. REV. 47 (1987).

C. Thus we come to the central question: did the Florida Supreme Court conduct either an independent reweighing or a harmless error analysis as required by *Parker* and *Clemons*?

i. *Reweighing.* "[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances." *Parker*, 111 S.Ct. 738 (citing cases). The state court has held that it complies with *Clemons* by the second alternative, harmless error analysis. *White v. Dugger*, 565 So.2d 700, 702 (Fla.1990), *Preston v. State*, 564 So.2d 120, 122-23 (Fla.1990).[14] *Parker's* view of Florida law on this point is correct.

At bar, the court followed its practice and did not reweigh, deferring to the trial court's judgment finding and weighing mitigation and aggravation. As to statutory

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[14] Although the court may have sometimes conducted reweighing prior to 1981, *see Goode v. State*, 365 So.2d 381 (Fla.1978), it disavowed any independent reweighing in *Brown v. Wainwright*, 392 So.2d 1327, 1331 (Fla.1981), and has never looked back. It has also made clear that its proportionality review does not involve reweighing. *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla.1988). The court sees itself as "a reviewing court, not a fact-finding court," so that it defers to the findings of the trial court. *Lucas v. State*, 568 So.2d 18, 23 (Fla.1990). *Lucas* also made clear that proportionality review does not involve determination of whether the death penalty is necessarily the correct sentence: "On the facts of this case we do not agree that death is necessarily disproportionate for this killing. We cannot say, however, whether the court properly found it to be appropriate."

mental mitigating circumstances, the supreme court wrote that "the decision as to whether a particular mitigating circumstance is proven lies with the judge and jury. . . . We see no reason to disturb the court's rejection of these mitigating factors." JA 380; 580 So.2d at 604. As to Mr. Sochor's troubled and difficult childhood: "Deciding whether such family history establishes mitigating circumstances is within the trial court's discretion." JA 381; 580 So.2d at 604.[15] The court did not even consider such other mitigating matters as the nonstatutory mitigating effect of the overwhelming evidence of Mr. Sochor's deranged state at the time of the crime,[16] and made no mention of his repeated expressions of remorse in his statements to the police,[17] or of his attempts to help locate the body. Further, the court deferred to the trial court's finding of the heinousness circumstance,[18] and did not consider what weight to give it:

[15] In other cases, the court has held that such evidence is mitigating as a matter of law. *See Campbell v. State*, 571 So.2d 415 (Fla.1990), and *Nibert v. State*, 574 So.2d 1059 (Fla.1990).

[16] *See Perry v. State*, 522 So.2d 817 (Fla.1988) ("psychological stress" as nonstatutory mitigation); *Cheshire v. State*, 568 So.2d 908 (Fla.1990) ("any emotional disturbance relevant to the crime").

[17] R 481 ("Q Do you feel sorry for what you have done? A Yes, tremendously sorry."), 486-87 ("I would say if God could give me the power to bring her back, I would, or if I could take my life in place of hers, I would. That—I don't know if it were my daughter, how could forgive a person . . . I'm so deeply sorry, somehow that just isn't enough. I can never cry enough tears for the hurt and pain I have caused."), 504 ("I believe I started crying on my way home."), 505 (he felt "terrified, shocked" at what he had done), 506 ("I am so sorry. This is the hardest think I've ever had to live with in my life."), 530 ("I cried many nights wondering what I had done"), 531 ("I feel like I finally am owing up to something that needed to be paid up a long time ago"), 532 ("I am deeply sorry for having hurt Patty, and I am deeply sorry for all the time and trouble I have caused everyone"). As to the mitigating effect of such remorse *see Songer v. State*, 544 So.2d 1010 (Fla.1989).

[18] The court uses a deferential abuse of discretion standard in reviewing findings of aggravating circumstances. *Gaskin v. State*, 16 Fla. L. Week. S762, S763 (Fla. Dec. 5, 1991).

it did not purport to determine how the circumstances weighed out in light of the state's evidence that Mr. Sochor acted in an irrational frenzy.[19]

This deference involved more than acceptance of the trial court's very limited findings of historical fact. It involved a refusal to consider potentially mitigating evidence (which the jury may have accepted) on the ground that the trial court had made the determination that such evidence was not mitigating even if factually uncontested. Yet the supreme court has itself noted that a Florida trial judge's conclusory finding such as the one to which it here deferred ("'after considering [the mitigating] testimony, this Court finds no nonstatutory "mitigating" circumstances'") may mean any of several different things: "(1) that the evidence urged in mitigation was not factually supported in the record; (2) that the facts, even if established in the record, had no mitigating value; or (3) that the facts, although supported by the record and also having mitigating value, were deemed insufficient to outweigh the aggravating factors involved." *Rogers*, 511 So.2d at 534. Without attempting to disentangle these several possible meanings of the trial court's limited rejection of nonstatutory mitigation,[20] the court

[19] The heinousness circumstance can be given lesser weight where the defendant acted in an irrational frenzy. *Amazon v. State*, 487 So.2d 8, 13 (Fla.1986). *See also Mann v. State*, 420 So.2d 578, 581 (Fla.1982) ("There is frequently a significant connection between the grossness of a homicide and the perpetrator's mental condition.").

[20] The finding of no mitigation at bar seems to fall into the third category. The state's evidence, by which it is bound under state law, *Davis v. State*, 90 So.2d 629, 632 (Fla.1956), *D.J.G. v. State*, 524 So.2d 1024 (Fla.App.1987), was that Mr. Sochor was under the influence of some sort of mental disturbance at the time of the killing. The evidence regarding Mr. Sochor's upbringing, being unrebutted, had also to be taken as mitigating under *Rogers*, and *Campbell*. *See also Banda v. State*, 536 So.2d 221, 224-25 (Fla.1988) ("we have held that a "pretense of moral or legal justification existed where the defendant consistently had made statements that he had killed

simply acceded to it, writing that "[e]ven after removing the aggravating factor of cold, calculated and premeditated there still remain three aggravating factors to be weighed against *no mitigating circumstances*," JA 381; 580 So.2d at 604 (emphasis added) and that "[t]he trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted." *Id.* This limited appellate review falls short of the independent reweighing of the evidence of sentencing circumstances contemplated in *Clemons* and *Parker*.

ii. *Harmless error review.* As already noted, Florida's chosen response to *Clemons* is harmless error review. The complete harmless error review below was:

> The trial court carefully weighed the aggravating factors against the lack of any mitigating factors and concluded that death was warranted. Even after removing the aggravating factor of cold, calculated, and premeditated there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing. [Cit.] Under the circumstances of this case, and in comparison with other death cases, we find Sochor's sentence of death proportionate to his crime.

JA 381-82; 580 So.2d at 604. This discussion differs little from what the state court said in *Clemons v. State*, 535 So.2d 1354, 1364-65 (Miss. 1988) (indicating that, even with one aggravating circumstance struck, remaining circumstance will support the death penalty, and ruling that death sentence was not disproportionate). Like the Mississippi court's pronouncements, the Florida court's first three sentences "can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance," *Clemons v. Mississippi*, 110 S.Ct. at 1450, while the last sentence (apparently addressed to the separate issue of statutory proportionality review), adds nothing but the kind of ambiguity also found in *Clemons*. 110 S.Ct. at 1451.

Further, under the teachings of *Yates v. Evatt*, 111 S.Ct. 1884 (1991), a finding of harmless error could not be made on this record without a more searching consideration of mitigating evidence. The "premeditation" circumstance was improperly submitted to the jury, which returned a death verdict that heavily influenced Mr. Sochor's sentence. Although the trial judge later found no mitigating circumstances to outweigh the aggravating circumstances and the Florida Supreme Court deferred to this finding, there is no way to know that the jury did not find mitigating circumstances sufficient to call for a life sentence when not weighed against the improper circumstance. And if the jury rendered a life verdict, there can be no doubt that the amount and kind of mitigation revealed by this record would have caused the supreme court to order a life sentence, no matter what the trial judge found or did.

"[I]t is the jury's function, in the first instance, to determine the validity and weight of the evidence presented

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the victim only after the victim jumped at him and where no other evidence existed to disprove this claim. [Cit.] We reached this conclusion even though the accused himself, an obviously interested party, was the only source of this testimony."). The only discretion the trial court had was to determine the weight to assign to the evidence. *Campbell, Rogers, Wickham v. State*, 16 Fla. L. Week, S777, S777-78 (Fla. Dec. 12, 1991). By way of contrast, had the trial court considered the evidence of Mr. Sochor's remorse (which it did not directly address), it might have been free to reject it on the ground that it was somewhat rebutted by other evidence in the case.

Factual findings of no mitigation in Florida are less determinations of historical than judgment calls that can be discarded even where the underlying facts do not change. Thus in *King v. Dugger*, 555 So.2d 355 (Fla.1990), the court upheld a resentencing court's finding that the defendant's age at the time of the offense was not mitigating ever though the original court had found that mitigating circumstance, although the underlying fact obviously had not changed.

in aggravation and mitigation." *Holsworth v. State*, 522 So.2d 348, 354 (Fla. 1988).

Although the ultimate sentencing decision is the judge's, that decision is almost dictated by the penalty verdict: where there is a life verdict, the judge can impose a death sentence only where no reasonable person could agree with the verdict. *Tedder*. The great majority of life verdicts result in life sentences, and the few override sentences are almost always reversed: from 1986 through 1990, the court affirmed only two override sentences;[21] in 1990, the court reversed every override death sentence to come before it on direct review;[22] and in 1991 it has affirmed only one.[23] A life verdict mandates a life sentence except in the most extreme cases.[24]

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[21] Mello, *The Jurisdiction to do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U.L. REV. 923, 937 (1991). In 1984 and 1985, the court affirmed most of the override sentences to come before it, *id.*, but it has since determined that its practice during that period was incorrect. *Cochran v. State*, 547 So.2d 928, 933 (Fla.1989).

[22] *Morris v. State*, 557 So.2d 27 (Fla.1990); *Hallman v. State*, 560 So.2d 223 (Fla.1990); *Cheshire; Carter v. State*, 560 So.2d 1166 (Fla.1990); *Buford v. State*, 570 So.2d 923 (Fla.1990); and *Hegwood v. State*, 575 So.2d 170 (Fla.1990).

[23] *Zeigler v. State*, 580 So.2d 127 (Fla.1991) (defendant killed a series of persons as part of elaborate plan to obtain insurance proceeds). The court reversed override sentences in the following cases: *Bedford v. State*, 16 Fla. L. Week. S665 (Fla. Oct. 10, 1991); *Cooper v. State*, 581 So.2d 49 (Fla.1991); *Craig v. State*, 585 So.2d 278 (Fla.1991); *Dolinsky v. State*, 576 So.2d 271 (Fla.1991); *Douglas v. State*, 575 So.2d 165 (Fla.1991); *Downs v. State*, 574 So.2d 1095 (Fla.1991); *McCrae v. State*, 582 So.2d 613 (Fla.1991); *Savage v. State*, 16 Fla. L. Week, S647 (Fla, Oct. 3, 1991); and *Wright v. State*, 586 So.2d 1024 (Fla.1991).

[24] By the same token, the judge is generally supposed to follow a jury's death recommendation. *Grossman v. State*, 525 So.2d 833, 839, n. 1 (Fla.1989) ("a jury recommendation of death should be given great weight"); *Chambers v. State*, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring) ("Where a jury and a trial judge

This Court recognized the great importance of the jury's role in Florida capital sentencing proceedings in *Hitchcock v. Dugger* 481 U.S. 393 (1987), finding an Eighth Amendment violation where both the judge and the jury were limited in their consideration of mitigating evidence. If anything, subsequent case law strengthens the importance of the penalty verdict.

The effect of a life verdict is such that the trial court cannot override it even when presented an additional aggravating circumstance not available to the jury. *Cochran* (trial court used subsequent first degree murder conviction, of which jury was unaware, to override life verdict; reversing, supreme court wrote that existence of additional circumstance did not make the jury's life verdict so unreasonable as to justify the override).[25]

Where the jury has rendered a reasonable life verdict, the Double Jeopardy Clause of the Florida Constitution forbids the state from seeking a death sentence at a retrial, even though the trial court imposed a death sentence at the first trial. *Wright*, 586 So.2d at 1032.

The nature of supreme court review depends almost entirely on the penalty verdict. When the jury has returned a life verdict, the supreme court ignores a trial court finding of little or no mitigation, and scrutinizes the record for mitigation that the jury may have found.[26] Thus

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reach contrary conclusions . . . the jury recommendation should be followed"); *LeDuc v. State*, 365 So.2d 149, 151 (Fla.1978) (death recommendation "should not be disturbed . . . unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation").

[25] Similarly, in *Buford*, *Douglas*, and *McCrae*, the court held that, on resentencing, the trial court could not override life verdicts rendered ten or more years previously, even where the evidence at resentencing was quite different from the evidence at the original sentencing.

[26] A life verdict also affects supreme court review in another fundamental way. Where there has been a death verdict, the court

in *Carter v. State*, 560 So.2d 1166, the court reduced a death sentence to one of life imprisonment even though the trial court had found five aggravating circumstances and no mitigating circumstances. In reaching this conclusion, the court combed the record for mitigating factors rejected by the judge but which the jury may have found.[27] *See also, e.g., Christian v. State*, 550 So.2d 450 (Fla. 1989) (defendant repeatedly stabbed handcuffed fellow inmate and threw him off balcony; trial court found four aggravating circumstances, no mitigating); *Cheshire* (trial court found three aggravating circumstances, no mitigation); *Downs*, 574 So.2d 1095 (trial court found four aggravating circumstances and no mitigation); *Hegwood* (triple homicide; trial court found six aggravating circumstances and one mitigating); *Dolinsky* (trial court found three aggravating circumstances and no mitigation).

In *Cooper v. State*, 581 So.2d 49, the court reversed an override sentence where the trial court found four aggravating circumstances and two nonstatutory mitigating circumstances. The supreme court held that the trial court could not make its own independent determination as to whether Mr. Cooper or his co-defendant was the killer: "The trial court's finding Cooper to have been the actual killer may have been a substitution of the court's judgment for that of the jury." *Id.* at 51, n.[28]

Had the jury returned a life verdict at bar, the court would have engaged in a similar search of the record of

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looks only to other death verdict cases in conducting its proportionality review. *Hitchcock v. State*, 578 So.2d 685 (Fla.1990). *See also Stone v. State*, 378 So.2d 765, 772 (Fla.1975).

[27] Chronic alcohol and drug abuse, amenability to rehabilitation, diminished capacity, organic brain syndrome.

[28] The 1991 decision was the result of a resentencing. The supreme court had previously specifically *upheld* a finding that Mr. Cooper was the killer. *Cooper v. State*, 336 So.2d at 1141 (Fla.1976).

mitigation and would have found ample evidence to support the life verdict: Mr. Sochor's co-operation with authorities, his remorse, his disturbed mental state at the time of the crime, his troubled childhood, abuse suffered at the hands of his parents, his problems with alcohol and drugs, his consumption of alcohol on the night of the murder, his record as a hard worker and support for his family, and his psychosexual disorder. *See Holsworth* and *McCrae*.

In light of the decisive impact of a jury's verdict on appellate review and appellate consideration of mitigation such as that at bar, any proper harmless error analysis must consider the effect that the improper submission of an aggravating circumstance may have had on the jury. The Florida court has itself elsewhere recognized this point. In *Elledge v. State*, 346 So.2d 998, 1003 (Fla.1977), the court wrote that, where, as here, the trial court has at least impliedly considered nonstatutory mitigating circumstances by writing that it weighed mitigating circumstances against aggravating circumstances, the consideration of an improper aggravating factor requires new jury sentencing proceedings:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial. . . .

See also Trotter v. State, 576 So.2d 691 (Fla.1991), *Omelus v. State*, 584 So.2d 563 (Fla.1991), *Jones v. State*, 569 So.2d 1234, 1238-39 (Fla.1990). Similarly, in affirming sentences, it has considered whether the error would have affected either the judge *or the jury*. *Herring v. State*, 580 So.2d 135 (Fla.1991), *Hill v. State*, 515 So.2d

176 (Fla.1987). Thus it wrote in *Riley v. Wainwright*, 517 So.2d 656, 659 (Fla.1987):

> If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

The court has ordered new jury sentencing proceedings because of errors involving jury instructions,[29] evidentiary rulings,[30] improper use of an aggravating circumstance,[31] limitation of defense argument,[32] and improper prosecutorial argument,[33] and has ordered new jury sentencing in death verdict cases even where the trial judge specifically found no mitigating circumstances.[34]

New jury sentencing proceedings are required where an instructional error would not affect the evidence that was presented,[35] and where the trial court has stated the error did not affect its sentencing decision:

> It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation. If so, the trial judge could not override the jury's recommendation and sentence Hall to death.

Hall v. State, 541 So.2d 1125, 1128 (Fla.1989).

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[29] *Stewart v. State*, 558 So.2d 416 (Fla.1990).

[30] *Colina v. State*, 570 So.2d 929 (Fla.1990).

[31] *Omelus; Hill v. State*, 549 So.2d 179 (Fla.1989).

[32] *Jones*, 562 So.2d 1234.

[33] *Taylor v. State*, 583 So.2d 323 (Fla.1991).

[34] *Jones*, 569 So.2d 1234 (double homicide), *Taylor* (unanimous death recommendation), *Colina*.

[35] *Waterhouse v. State*, 522 So.2d 341 (Fla.1988) (jury resentencing necessary where original jury was presented nonstatutory mitigating evidence, but was told that it could not consider it).

To be sure, the Florida court has not consistently followed *Elledge*.[36] Florida cases on harmless error are gen-

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[36] There is no discernible pattern in the cases as to when the court will affirm, when it will reverse for judge resentencing, and when it will reverse for jury resentencing. In *Rivera v. State*, 561 So.2d 536 (Fla.1990), the court affirmed after striking one of four aggravating circumstances used by the trial court, even though the trial court found statutory mitigation that the defendant was extremely disturbed at the time of the murder. *See also Rutherford v. State*, 545 So.2d 853 (Fla.1989) (striking one of four circumstances, but affirming even though court found statutory mitigation of lack of significant prior criminal activity), *Shere v. State*, 579 S.2d 86 (Fla.1991) (striking one of three circumstances, but affirming even though court found statutory mitigation of defendant's age). But in *Campbell*, the court ordered resentencing without a jury after striking one of four aggravating circumstances where the trial court found nothing in mitigation. *See also Dailey v. State*, 16 Fla. L. Week. S740 (Fla. Nov. 14, 1991) (ordering judge resentencing after striking two of five aggravating circumstances where jury unanimously recommended death and trial court's sentencing order stated: "This Court does not consider any of the factors presented by the Defendant to mitigate this crime."). And in *Omelus*, the court ordered new jury proceedings after striking one of three aggravating circumstances where the trial court found only in mitigation the disparate treatment of the defendant's hireling. In *Trotter*, the initial decision ordered resentencing without jury proceedings, 16 Fla. L. Week. S17, S18, but the court changed the relief on rehearing to jury resentencing without explanation. 576 So.2d at 694. At times, the announced reason for reversal involves the size of the jury vote for death. *Alvin v. State*, 548 So.2d 1112 (Fla.1989), *Omelus*. At other times, the decision turns on the nature of the circumstance: the premeditation and heinousness circumstances are considered worse than the others, and their presence or absence can be crucial in the decision whether to reverse. *Hardwick v. State*, 521 So.2d 1071 (Fla.1988), *Fitzpatrick*. Other times, the decision is based on whether striking the circumstance would affect the evidence before the jury, as though instructional error alone could have no effect on the verdict, *Herring*, while in *Stewart* the court ordered new jury proceedings for the trial court's refusal to instruct the jury on the "substantially impaired" statutory mitigating circumstance (§ 921.141(6)(f), Fla.Stat.), even though the defense expert had testified that the defendant was "impaired but not substantially." (Curiously the court upheld the trial court's refusal to

erally inconsistent.[37] But the measure of state court compliance with *Parker* and *Clemons* cannot be left to the state court's own devices. When state law gives a verdict the effect that Florida's case law and constitution give to the penalty verdict, any kind of harmless error analysis that would satisfy *Parker* and *Clemons* must consider the case as submitted to the jury. If that submission involved a legally impermissible aggravator, harmless error review cannot be limited, as the Florida Supreme Court limited its review here, to subtracting the circumstance from the trial judge's sentencing findings, adding a trial judge finding of no mitigation to outweigh aggravating circumstances with which the jury may have agreed, and con-

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instruct on the nonstatutory circumstance of less than substantial impairment.)

[37] The main Florida case is *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986) (applying harmless error analysis to comment on silence of accused), in which the court wrote at page 1139:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test.

But the supreme court has often cited *State v. DiGuilio* in favor of the standard of which is disapproved! *See Burr v. State*, 576 So.2d 278, 280 (Fla.1990) ("overwhelming evidence"), *Dailey* ("other substantial evidence of guilt"), *Downs v. State*, 572 So.2d 895, 899-900 (Fla.1990) ("overwhelming proof"), *Shere* ("quality and quantum of incriminating evidence"), *Jackson v. State*, 575 So.2d 181, 189 (Fla.1991) (other evidence of guilt), *Duckett v. State*, 568 So.2d 891, 895 (Fla.1990) ("given all the other evidence").

In *Wickham*, the court struck one aggravating circumstance, ruled that the trial court had ignored extensive mitigating evidence, but affirmed with the brief statement that in light of the "very strong case for aggravaion, we find that the trial court's error in weighing the aggravating and mitigating factors could not reasonably have resulted in a lesser sentence." Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263 (1986) is a mordant account of the confusion in Florida's system of appellate review of death sentences.

cluding that the resulting sum of "three aggravating factors to be weighed against no mitigating circumstances . . . does not necessarily require resentencing." 580 So.2d at 604. The court denied Mr. Sochor a responsible weighing of legally cognizable aggravation against legally cognizable mitigation at any single stage of his trial or appeal.

II. "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE

A. The Court taught in *Proffitt* and *Maynard* that the "especially heinous, atrocious, or cruel" circumstance is facially unconstitutional and requires a narrowing construction, and ruled in *Godfrey v. Georgia*, 446 U.S. 420 (1980), *Maynard* and *Shell* that jury instructions without an adequate narrowing construction are unconstitutional. Mr. Sochor's jury received only this instruction on the circumstance:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
> . . . .
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

JA 326.[38] This instruction, virtually identical to the improper instruction used in *Clemons*, 110 S.Ct. 1441, 1445, n. 1 (1990), violates the teachings of *Godfrey*, *Maynard*, and *Shell*.

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[38] Mr. Sochor did not object to the instruction in the trial court. Nevertheless, the supreme court, while noting the lack of objection, reached the merits of this issue. 580 So.2d at 602-603, and n. 10. Florida law on whether an appellant can raise a jury instruction issue for the first time on appeal was unclear both at the time of Mr. Sochor's 1987 October trial and since. *See Ray v. State*, 403 So.2d 956, 961 (Fla.1981) (failure to object to instruction on improper lesser offense did not bar reversal), *Carter v. State*, 469 So.2d 194, 196 (Fla. 2d DCA 1985) (erroneous instruction on theory

Since the jury received an unconstitutional jury instruction, the resulting penalty verdict is unconstitutional. This is so even though the jury may have, and the judge did, find other aggravating circumstances. *Maynard, Clemons.*

Shell mandates reversal at bar. There the Court reversed the state supreme court's rejection of a *Maynard* attack on an improper jury instruction on the heinousness circumstance in a case in which the defendant severely cut a 68 year old widow in her home and beat her to death with a series of blows with a heavy metal object. The state supreme court's discussion showed that there was little mitigation. In addition to writing that its instruction did not violate the teachings of *Maynard* and citing *Clemons v. State*, 535 So.2d 1354 (Miss.1988) (circumstance limited to murders that are conscienceless or pitiless and unnecessarily torturous to victim) for the proposition that the circumstance had been constitutionally narrowed, the state court wrote that, even without the heinousness circumstance, the remaining circumstance (that the killing occurred during a robbery) sufficed to uphold the death sentence. *Shell v. State*, 554 So.2d 887, 906 (Miss.1989).

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of defense subject to review even where not preserved; citing cases); *Tobey v. State*, 533 So.2d 1198, 1200 (Fla. 2d DCA 1988) (en banc) (agreeing with *Carter*, but not applying it where error could not have affected verdict); *State v. Delva*, 575 So.2d 643, 644-45 (Fla. 1991) (failure to object to erroneous instruction on uncontested element of offense bars appellate review, indicating that court would have reached merits if error had been "pertinent or material to what the jury must consider in order to convict"). Thus in *Smally v. State*, 546 So.2d 720 (Fla.1989). The court wrote that the absence of an objection below barred consideration of a *Maynard* claim, but then ruled on the *Maynard* claim, and has ever since cited *Smalley* as dispositive of the issue. *E.g. Occhicone v. State*, 570 So.2d 902, 906 (Fla.1990). Accordingly, the failure to object at bar does not preclude review. *See Ford v. Georgia*, 111 S.Ct. 850 (1991). Further, the pretrial motion attacking the circumstance as unconstitutionally unlimited put the trial court on notice as to the nature of his complaint regarding the circumstance. *See Osborne v. Ohio*, 110 S.Ct. 1691, 1704-1705 (1990).

The court went on to rule that the evidence supported the heinousness circumstance and the death sentence was proportionate. *Id.* at 907. Similarly, the supreme court at bar upheld the trial court's finding of the circumstance and ruled that the death sentence was not disproportionate.

From the foregoing, the issue at bar presents two questions: First, are *Shell*, *Maynard*, and *Clemons* inapplicable because in Florida the judge passes the ultimate sentence after considering the jury penalty verdict? Second, did the trial judge's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance or the appellate review of that finding cure the unconstitutionality of the penalty verdict under *Walton*?

B. In *Proffitt*, the Court understood that the limiting construction was to provide guidance both to the jury (those recommending the sentence) and to the judge (the one imposing sentence): "We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases."). 428 U.S. at 255-56. As already shown, the jury's penalty verdict is decisive of the sentencing decision in virtually all Florida capital cases. The rationale of *Maynard* and *Clemons* is that a death-sentencing procedure must ensure a principled means to distinguish those that receive the death penalty from those that do not. *Maynard*, 486 U.S. at 362. Since it is the jury's verdict which almost invariably distinguishes the defendants who will die from those who will live, that verdict must meet the requirements of *Maynard* and *Clemons*.

In *Smalley*, 546 at 722, the court rejected a similar argument. It wrote that Florida's death sentencing procedure differs from Oklahoma's in that the Florida penalty verdict is advisory, and the judge's sentencing order makes it possible to discern 'upon what facts the sentencer relied in deciding that a certain killing was heinous, atrocious, or cruel."

Smalley proceeded on the tacit theory that constitutional errors in the jury sentencing proceedings are irrelevant because the trial court can "clean things up" with its sentencing order. The thinking seems to be that the state can confer on the defendant the right to a jury sentencing, but can then make the jury proceeding infirm through the use of unconstitutional jury instructions, so long as there is a later, constitutionally adequate, proceeding before the trial judge.

This procedure might be adequate if the trial judge's findings and weighing were independent of the flawed penalty verdict, which they are not.[39] The judge's findings are no substitute for the findings implicit in the jury's verdict, and where there has been a life verdict, the judge's findings count for naught. *E.g. Cooper*, 581 So.2d 49; *Ferry v. State*, 507 So.2d 1373, 1377-78 (Fla.1987) (specifically rejecting argument that judge's weighing could substitute for jury's). *Smalley* ignores the statements in *Proffitt* that the jury needs guidance in applying the circumstance and in *Hitchcock* that limitation of the Florida jury's consideration of mitigation violates the Eighth Amendment. It is simply irrational for Florida to rely on the jury as the principal in its sentencing process but then give the jury a patently unconstitutional jury instruction that fosters arbitrary application of the death penalty.

C. In *Walton*, the Court considered the impact of *Maynard* and *Clemons* on a purely judge sentencing state. The *Walton* analysis, which assumes that the state supreme court has adopted an acceptable definition of the circum-

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[39] Thus, this case does not present the question of whether a truly independent sentencing determination by the judge might satisfy *Clemons* and *Walton*. *See Baldwin v. Alabama*, 472 U.S. 372, 382 (1985) (erroneous jury recommendation irrelevant since court gave no deference to it, noting result might differ if, as in Florida, "the judge were obligated to give some deference" to tainted recommendation).

stance, is that the trial court is assumed to know and to apply that construction and that, even if the trial court does not, the appellate court may, under *Clemons*, either make its own determination that the evidence supports the circumstance or make a determination that, even without the circumstance, the death penalty would be appropriate.

Assuming *arguendo* that *Walton* applies to Florida (and Mr. Sochor argues that it does not because the jury is the primary actor in Florida's sentencing scheme), the Florida courts' treatment of the circumstance still require reversal. Florida does not have a uniform narrowing construction of the circumstance. The trial court did not apply the correct narrowing construction either expressly or by implication, and instead employed an improper construction. The supreme court did not make its own determination of the circumstance and made no determination that the death sentence would not be affected if the circumstance were struck.

i. *Florida has no consistent standard for the circumstance.* It is not enough to have an appropriate narrowing construction: the state must apply the construction consistently. Picking and choosing among various constructions on a case-by-case basis violates the Eighth Amendment. *Maynard*, 486 U.S. at 360 (discussing Tenth Circuit opinion with approval). Florida's circumstance suffers from this flaw. In *Proffitt*, the Court approved a construction of the circumstance that limited it to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." 428 U.S. at 254-56 (plurality opinion). This construction stemmed from these definitions in *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with

> utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

It is immediately apparent that *State v. Dixon* said that the "conscienceless . . . pitiless . . . unnecessarily torturous" crime was only "to be included": the Florida court did not expressly *limit* the application of the circumstance to such crimes.[40] This small point has had large consequences: although the court sometimes uses the *Proffitt* limitation, it more frequently substitutes different standards for the circumstance on a case-by-case basis.

Although the Florida Supreme Court wrote in *Smalley* that it had "continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim," history does not bear out this claim. In 1982, the court disapproved narrowing *State v. Dixon* limitations, *Vaught v. State*, 410 So.2d 147, 151 (Fla.1982) (specifically rejecting claim, based on *State v. Dixon*, that circumstance focuses on infliction of physical pain or mental anguish),

[40] Indeed, the court considered the "conscienceless . . . pitiless . . . unnecessarily torturous" language to be surplusage. It adopted the following jury instructions in 1975, which give no hint that the circumstance is limited only to such crimes:

> That the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others, pitiless.

Standard Jury Instructions in Criminal Cases, 78 (1975). *See Pope v. State*, 441 So.2d 1073, 1077 (Fla.1984). In *Pope*, the court approved "as a definitive statement of the law," jury instructions deleting any reference to the *Proffitt* construction.

and in 1984, it removed the constitutionally approved construction. *Pope*, 441 So.2d at 1077-78 (disapproving of requirement that murder be "conscienceless or pitiless": "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue."). Since then, the court has wavered dramatically in its application of the circumstance.

Sometimes it has apparently followed *Proffitt*, ruling that the circumstance includes both a mental element of torturous intent, and the physical element that the killing was unnecessarily torturous.[41] *Mills v. State*, 476 So.2d 172, 178 (Fla.1985) ("The intent and method employed by the wrongdoers is what needs to be examined."), *Teffeteller v. State*, 439 So.2d 840, 846 (Fla.1983) (error to find circumstance even where decedent "lived for a couple of hours in undoubted pain and knew that he wasfacing [sic] imminent death"; no evidence of torturous intent), *Mendyk v. State*, 545 So.2d 846, 850 (Fla.1989) (applying circumstance where defendant deliberately tortured decedent for a lengthy period of time).

Other times, it has regarded the mental element of torturous intent as being of paramount importance. *E.g. Porter* (record did not show torturous intent),[42] *Santos*

[41] The court has never stated what makes a murder "unnecessarily" torturous. Presumably the term refers to homicides where the killers have gone out of their way to select torturous or very painful methods of killing.

[42] The court wrote:

> We agree that the murder of Williams did not stand apart from the norm of capital felonies, nor did it evince extraordinary cruelty. We see little distinction between this case and *Amoros v. State*, 531 So.2d 1256, 1261 (Fla.1988), wherein the Court struck the trial court's finding of especially heinous, atrocious, or cruel on a finding that the murderer fired three shots into the victim at close range. Moreover, this record is consistent with the hypothesis that Porter's was a crime of passion, not a crime that was *meant* to be deliberately and extraordinarily painful. The state has not met its burden of proving this

v. State, 16 Fla.L.W. S633 (Fla. Sept. 26, 1991).[43]

But in *Hitchcock v. State*, 578 So.2d at 692, it wrote that the absence of a torturous intent is irrelevant: "That Hitchcock might not have meant the killing to be unnecessarily torturous does not mean that it actually was not unnecessarily torturous and, therefore, not heinous, atrocious, or cruel. This aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's." *See also Mason v. State*, 438 So.2d 374, 379 (Fla.1983) (circumstance "pertains to the nature of the killing itself"), *Stano v. State*, 460 So.2d 890, 893 (Fla. 1984) (same), *Pope* (defendant's mindset never at issue). On the other hand, the court wrote in *Vaught* that the circumstance did not require infliction of physical pain or mental anguish. 410 So.2d at 151 (citing cases).

In *Lloyd v. State*, 524 So.2d 396, 403 (Fla.1988), the court wrote that the circumstance would apply either if the unconstitutionally vague standard of "extremely wicked or shockingly evil" were applied or if the crime were "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of," the decedent's suffering. In *Jackson v. State*, 498 So.2d 906, 910 (Fla.

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factor beyond a reasonable doubt, and the trial court erred in finding to the contrary.

564 So.2d at 1063 (emphasis in original).

[43] As we recently explained in *Cheshire v. State*, 568 So.2d 908 (Fla.1990), this factor is appropriate in torturous murders involving extreme and outrageous depravity. A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another. *Id.* at 912. 'The torture-murder in *Douglas*, which involved heinous acts extending over four hours, illustrates a case in which this factor was appropriately found. *Douglas*, 575 So.2d at 166. The present murders happened too quickly with no substantial suggestion that Santos intended to inflict a high degree of pain or otherwise torture the victims. Accordingly, the trial court erred in finding this factor to be present.

1986), it read the circumstance so broadly as to cover any capital crime that is "accompanied by such additional acts as to set the crime apart from the norm of capital felonies."

Thus the court applies divers standards:[44] limited to crimes that are conscienceless or pitiless, and unnecessarily torturous, *Proffitt*, *Smalley*; including but not limited to such crimes, *State v. Dixon*; defendant's mindset is never at issue, *Pope*; infliction of physical pain or mental anguish irrelevant, *Vaught*; murder must be meant to be deliberately and extraordinarily painful, *Porter*; torturous intent irrelevant, *Hitchcock*; murder accompanied by additional acts setting it apart from norm, *Jackson*, 498 So.2d 906; *Harvard v. State*, 414 So. 2d 1032 (Fla.1982); extremely wicked or shockingly evil. *Lloyd*.[45]

ii. *The trial judge's determination of the circumstance was flawed.* Even if Florida did consistently use the *Proffitt* limitation, the trial court did not purport to apply it at bar.[46] At most, the sentencing order stated

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[44] Sometimes on the same day. On May 2, 1991, the court explicitly applied the torturous intent standard in striking the circumstance in *McKinney v. State*, 579 So.2d 80 (Fla.1991) ("The evidence does not show that the defendant intended to torture the victim."), but implicitly applied the *Hitchcock* "intent irrelevant" standard in affirming the circumstance in the instant case without any inquiry into Mr. Sochor's intent.

[45] As may be expected, the lack of a uniform standard results in inconsistent results, with the consequence that the circumstance itself is unconstitutional under *Maynard*. This issue is discussed later in this brief.

[46] The Florida law presumption is not that the trial judge knew and applied the correct standard, but that he followed the jury instruction. *Zeigler v. Dugger*, 524 So.2d 419, 420 (Fla.1988). *See also Henry v. State*, 586 So.2d 1033 (Fla.1991) (even though trial court's order reflected use of wrong standard in determining mitigation, supreme court assumed that judge followed correct standard set out in jury instructions).

that, although the facts of the case were unclear, the evidence showed a struggle [47] in which Ms. Gifford screamed and scratched Mr. Sochor, so that she suffered fear and emotional trauma before her death. Based on an eccentric reading of Dr. Wright's testimony, the judge apparently concluded that the strangulation at bar was "slow and painful." The court made no specific finding that the crime was "conscienceless or pitiless" and "unnecessarily torturous," and the evidence could not have supported such a finding: the evidence was that Mr. Sochor, in a wild rage, strangled the woman in a quick struggle.

iii. *The Florida Supreme Court's review did not satisfy the requirements of* Walton. Apparently employing its deferential abuse of discretion standard of review,[48] the supreme court concluded that the trial court "properly found this aggravating factor." JA 379; 580 So. d at 603. It did not see any error in the proceedings below, and so did not undertake to make its own finding respecting the circumstance. Most importantly, it did not determine whether the evidence supported the circumstance "as properly defined." *Walton*, 110 S.Ct. at 3075. It wrote only that the evidence supported "the conclusion of horror and contemplation of serious injury or death," and that one could infer foreknowledge of death, extreme anxiety and fear from strangulation. It did not purport to use the *Proffitt* definition, apparently opting instead for the "defendant's mindset never at issue" version of the circumstance. It did not, and could not, say that the murder was unnecessarily torturous or that it was conscienceless or pitiless.

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[47] The order contained a significant inaccuracy on this point. The evidence simply did not show that Ms. Gifford "was forcibly removed from the truck while she pleaded for help and even begged for her life." State court fact findings are not to be accepted where not supported by the record. *Yates*, 111 S.Ct. at 1896.

[48] *Gaskin*.

Needless to say, the court, having seen no error in the application of the circumstance, did not determine whether the sentencing decision would have been the same without the circumstance.

D. We now come to the question of whether Florida's circumstance, held constitutional in *Proffitt*, is now unconstitutional under *Maynard*. In *Maynard*, the Court found the Oklahoma circumstance unconstitutional, approving the Court of Appeals' conclusion, based on a review of the case law, that

> while the Oklahoma court had considered the attitude of the killer, the manner of the killing, and the suffering of the victim to be relevant and sufficient to support the aggravating circumstance, that court had "refused to hold that any one of those factors *must* be present for a murder to satisfy this aggravating circumstance." 822 F.2d. at 1491.

486 U.S. at 360. The court concluded in *Cartwright v. Maynard*, 822 F.2d 1477, 1489 (10th Cir.1987), after a review of the very scattered Oklahoma case law on the circumstance, that cases could be cited to support application of the circumstance to almost any set of facts, and wrote:

> When the sentencer is free to rely upon any particular event that it believes makes a murder "especially heinous, atrocious, or cruel," the meaning that the sentencer attached to this provision "can only be the subject of sheer speculation." *Godfrey*, 428 U.S. at 429, 100 S.Ct. at 1765. Indeed, courts that have considered similar aggravating circumstances have held:
>
> > [A murder] can be especially heinous because the victim is too young, too old, or because the defendant chose his victims so that they were not too young or too old. If the defendant killed for no reason, the murder is especially heinous, as is a murder committed for a reason the appellate court does not like. A killing is especially heinous if the victim is aware of the impending

> death, and also if the killing is done without warning.
>
> Rosen, *The Standardless Standard*, 64 N.C.L.REV. at 989 (footnotes omitted). The direction of a sentencer who can rely upon all of the circumstances of a murder is as complete and as unbridled as the discretion afforded the jury in *Furman*. No objective standards limit that discretion.

822 F.2d at 1491.

Florida cases reveal a similarly scattered pattern. The advanced years or helplessness of the decedent has been considered relevant enough to be emphasized [49] and has also been considered irrelevant.[50] Gender of the decedent is sometimes decisive.[51] That the victim begged for life while in excruciating pain may or may not support the circumstance.[52] The circumstance is struck where the defendant leaves the victim to die a slow, painful lingering death,[53] but is upheld where the defendant ends the suffering with a *coup de grâce*.[54] A cold-blooded killing

[49] *Steinhorst v. State*, 412 So.2d 322, 340 (Fla.1982) ("execution-type slayings, requiring cold, brutal, and heartless calculation to murder by firing a shot into the skull of a defenseless human being"); *Johnston v. State*, 497 So.2d 863, 871 (Fla.1986) (citing cases emphasizing advanced years of decedent).

[50] *Clark v. State*, 443 So.2d 973, 977 (Fla.1983) (murder of "a disabled and defenseless elderly woman is a vile and despicable act," but does not satisfy circumstance).

[51] *Compare Grossman* (taking firearm from female officer during violent struggle and shooting her; circumstance upheld) with *Brown v. State*, 526 So.2d 903 (Fla.1988) (taking firearm from male officer during violent struggle and shooting him while, in "excruciating pain," he begged for his life; circumstance struck).

[52] *Compare Brown* with *Bruno v. State*, 574 So.2d 76 (Fla.1991) (circumstance upheld where defendant beat and shot victim begging for his life).

[53] *Teffeteller*.

[54] *Farinas v. State*, 569 So.2d 425 (Fla.1990); *Gaskin*.

for revenge is heinous,[55] but a cold, calculated and premeditated "crime of passion" is not.[56] Harassing and stalking one's ex-wife and killing her with a single gunshot is heinous,[57] but stalking her down, threatening her, and chasing her down the street while she frantically clutches her child, and then shooting her and the child is not heinous,[58] whereas repeatedly threatening a woman, holding her at gunpoint, shooting the telephone when she tries to call for help, and killing her as she holds her children in her arms is heinous,[59] but handcuffing a woman, taking her to a cemetery, and then pressing a gun to her cheek and shooting her is not.[60] Killing a person in his home is heinous because it "sets this crime apart from murder committed in, for example, a street, a store, or other public place," [61] but breaking into one's lover's house, and shooting her down as she fled in the presence of her children is not,[62] while shooting a person twice at home is heinous.[63] As in Oklahoma, a killing is especially heinous if the victim is aware of impending death,[64] and also if the killing is done without warning.[65]

[55] *Johnson v. State*, 393 So.2d 1069, 1073 (Fla.1981).

[56] *Porter*.

[57] *Harvard*.

[58] *Santos*.

[59] *Downs*, 574 So.2d 1095.

[60] *Robinson v. State*, 574 So.2d 108 (Fla.1991) (decided same week as *Downs*).

[61] *Breedlove v. State*, 413 So.2d 1, 9 (Fla.1982).

[62] *Wright*.

[63] *Troedel v. State*, 462 So.2d 392 (Fla.1985).

[64] *Huff v. State*, 495 So.2d 145 (Fla.1986) (victim raised hand when son pointed gun at him, indicating awareness of impending death).

[65] *Vaught*.

Like the Oklahoma court, 486 U.S. at 360, the Florida court has considered the attitude of the killer,[66] the manner of the killing,[67] and the suffering of the victim [68] to be relevant and sufficient to support the aggravating circumstance, but it has refused to hold that any one of these factors must be present for a murder to satisfy the circumstance.

The article by Professor Rosen cited in the Tenth Circuit's opinion in *Cartwright* shows that the overall picture of Florida cases differs little from the confused picture of Oklahoma cases:

> The incoherency of the standards applied by the Florida Supreme Court is readily evident. The defendant's lack of remorse has been used to support an especially heinous finding in one case and has been deemed irrelevant in another case. The victim's intoxication has been used both to uphold and to reverse an especially heinous finding. The victim's helplessness before the shooting has been used to support an especially heinous finding and to reject an especially heinous finding. Both the victim's knowledge that he was going to die and the defendant's willingness to kill a sleeping victim, who thus could not have known of impending death, have supported findings of especially heinous circumstances. Murders that the Florida Supreme Court has loosely described as "execution-style" murders have been deemed both especially heinous and not especially heinous.

Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L.Rev. 941, 974 (1986) (citations omitted). Because

[66] *Vaught* (rejecting argument that circumstance could not apply to spontaneous shooting without physical pain or mental anguish; circumstance applies to "cold and calculating" killing) (citing cases).

[67] *Mason*, 438 So.2d at 379 ("pertains to the nature of the killing itself"); *Stano; Breedlove.*

[68] *Hitchcock v. State.*

cause Florida, like Oklahoma, has been inconsistent in ruling what must be proven to support the circumstance, it has not applied the circumstance constitutionally.

Florida's tangle of cases reveals no doctrinal pattern. No one sitting down with the variety of standards that the supreme court uses could, from those standards, infer how the circumstance will be applied from one day to the next. If there is any pattern at all from the Florida cases as a whole it is that, in recent years, the court has sometimes considered shootings less heinous than other forms of homicide, reversing where it does not perceive the shooter as having had a torturous intent. *E.g.*, *Santos*; *Burns v. State*, 16 Fla. L. Week. S 389 (Fla. May 16, 1991). This despite the fact that the court has historically considered shootings more "conscienceless" than other killings because they are "coldblooded." [69]

This apparent (and unannounced) distinction between shooting cases and other cases can be constitutional only if it bears on the defendant's culpability according to standards of reasoned moral judgment of the defendant's moral guilt. *Enmund v. Florida*, 458 U.S. 782, 800 (1982); *Penry*, 492 U.S. at 319. It may be that the difference between shootings and other homicides can reflect a difference in culpability. But there is nothing about Mr. Sochor's act of strangling a young woman in a sudden and wild rage that is more culpable than, *e.g.*, deliberately shooting down a highway patrolman standing in a watery ditch begging for his life (*Burns*) or chasing down a screaming woman with a small child and shooting them both in the head (*Santos*). The court's striking the circumstance in *Burns* and *Santos* on a standard of lack of torturous intent, while upholding the circumstance at bar without any in-

[69] *E.g. Hargrave v. State*, 366 So.2d 1, 5 (Fla.1979) (execution-style shooting extremely wicked and shockingly evil); *Vaught* (spontaneous shooting); *Jones v. State*, 411 So.2d 165, 169 (Fla. 1982) ("shot him to death point-blank, in the style of an execution").

quiry into such intent, is not simply a failure to conduct state law proportionality, it is the application of different legal standards to the same aggravating circumstance for reasons that have nothing to do with the definition of the circumstance approved in *Proffitt*.

CONCLUSION

The judgment of the Florida Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX

Section 921.141, Florida Statutes

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premediated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.